

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RICKEY COCHRAN)	
Claimant)	
VS.)	
)	
DRYWALL CONSTRUCTION)	Docket Nos. 268,567
Respondent)	& 268,568
AND)	
)	
CINCINNATI INSURANCE)	
Respondent)	

ORDER

Respondent appeals the October 19, 2001, preliminary hearing Order of Administrative Law Judge Brad E. Avery. Claimant was awarded temporary benefits in the form of medical treatment and temporary total disability compensation after the Administrative Law Judge found that claimant proved accidental injury arising out of and in the course of his employment in both docket numbers, found timely notice was given in Docket No. 268,567, and went on to find just cause was shown for claimant's failure to give timely notice in Docket No. 268,567. The Administrative Law Judge found respondent had failed to post the appropriate workers' compensation notice pursuant to K.A.R. 51-12-2, therefore, extending the notice time to the 75 days under the just cause language of K.S.A. 44-520.

ISSUES

DOCKET No. 268,567

- (1) Did claimant prove that he suffered accidental injury on the date alleged?
- (2) Did claimant's accidental injury arise out of and in the course of his employment?
- (3) Did claimant provide timely notice of accident pursuant to K.S.A. 44-520?

- (4) If claimant failed to provide notice in a timely fashion, was there just cause for claimant's failure to notify respondent of the alleged accident?

DOCKET No. 268,568

- (1) Did claimant suffer accidental injury on July 30, 2001?
- (2) Did claimant's accidental injury arise out of and in the course of his employment with respondent?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed here, the Appeals Board finds for preliminary hearing purposes that the order of the Administrative Law Judge in Docket No. 268,567 should be reversed, while the order of the Administrative Law Judge in Docket No. 268,568 should be affirmed.

Claimant alleges accidental injury on two dates—June 18, 2001, and July 30, 2001. The first, June 18, 2001, occurred when claimant was installing sheetrock around a heating duct. Claimant testified he had to do substantial twisting and bending, resulting in injury to his low back. However, when claimant originally claimed accident, he alleged a date of May 18, 2001. Claimant then modified his accident date to June 18, 2001, at the time of preliminary hearing. When claimant was examined by Sergio Delgado, M.D., his medical expert, claimant testified that he advised Dr. Delgado he was injured on May 18, 2001. Dr. Delgado's report, however, shows both May 18 and May 8, 2001.

Claimant also advised his family doctor, Patricia H. Patrinely, D.O., that he was injured on the Thursday before his initial July 2, 2001, examination, which would make the accident date June 28, 2001. Claimant advised the physical therapist he was injured on June 29, 2001.

When claimant was first examined by Dr. Patrinely, he alleged right shoulder and right upper back pain. The initial series of examinations and treatments provided to claimant focused on claimant's gallbladder and his cervical and thoracic spine, but failed to include examinations and/or treatment of the lower back.

Claimant was off work from July 2 to July 29, 2001. On July 30, 2001, claimant returned to work for respondent. He advised his foreman, Jay Armstrong, that he was in pain. His foreman placed him on a lighter duty job, installing metal studs. Claimant was not allowed, on July 30, to handle sheetrock material, which was heavier than the individual metal studs. Claimant testified, however, that the constant bending, stooping and lifting required to install the studs aggravated his back condition. By the time claimant arrived home the night of July 30, he was in substantial pain and was taken to the Holton

Community Hospital emergency room by ambulance. The typed emergency room report from July 30, 2001, discusses claimant's ongoing low back complaints. There is no mention of a work-related connection in that report. However, in the handwritten emergency room report dated July 30, 2001, there are notes detailing claimant's discussion about his work and the fact that his back hurt at work.

Claimant testified that he originally contacted Mr. Armstrong about his ongoing back problems on the third day that he was working around the heating ducts, and then again at a later unspecified time. Mr. Armstrong denies any conversation with claimant about any work-related accident on or around June 18, 2001. Had claimant advised Mr. Armstrong on or around June 18, 2001, that his back had hurt, Mr. Armstrong would have referred him to a doctor.

Claimant also testified that he advised John Fernkopf, respondent's office manager and vice president, of his ongoing back problems. Mr. Fernkopf denied any knowledge of claimant's ongoing back problems prior to his conversation with someone from the billing department at Stormont-Vail Regional Health Center on July 31, 2001. Mr. Fernkopf also contacted both Jay Armstrong and Louie Gasperich regarding claimant's allegations of ongoing back problems. Both denied ever being advised of any accident during the months of June or July 2001. Neither was informed by claimant of the alleged ongoing low back problems prior to respondent being contacted by Stormont-Vail Regional Health Center on July 31, 2001.

The Administrative Law Judge found, first, that claimant provided notice of the original accident on June 18, 2001. He went on to find that there was just cause for claimant's failure to give ten days notice of the accident due to respondent's failure to post appropriate workers' compensation notices as required by K.A.R. 51-12-2(a). However, Mr. Armstrong testified that there was a workers' compensation notice on the inside lid of the gang box. The gang box is the box where they keep their tools and equipment. He was, however, unable to describe the contents of that notice. Mr. Fernkopf testified that a workers' compensation notice was attached to the wall next to the front door. This form was provided by his insurance agent and was on the wall next to the OSHA forms and the accident report forms.

Additionally, claimant admitted to having suffered prior workers' compensation injuries and submitting prior workers' compensation claims requesting medical treatment and temporary total disability compensation associated with those injuries.

In workers' compensation litigation, the burden of proof is upon claimant to establish his right to an award of compensation by proving the various conditions upon which his right to a recovery depends. This must be established by a preponderance of the credible evidence. See K.S.A. 44-501 and K.S.A. 44-508(g). See also Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

Whether an accident arises out of and in the course of a worker's employment depends upon the facts peculiar to the particular case. Messenger v. Sage Drilling Co., 9 Kan. App. 2d 435, 680 P.2d 556, *rev. denied* 235 Kan. 1042 (1984).

Claimant alleges two accidental injuries in this matter. The first was June 18, 2001, when claimant was installing sheetrock around heating ducts. However, claimant's accident date is claimed in the record as either May 18, June 18, June 28 or June 29, 2001. The medical records are as confusing regarding claimant's alleged initial accident, as is claimant's own testimony.

The Appeals Board finds that claimant has failed to prove that he suffered accidental injury on or around June 18, 2001.

K.S.A. 44-520 requires that notice be provided to respondent within ten days after the date of accident providing the time, place and particulars of the accident. In this instance, claimant alleges he advised both Mr. Fernkopf and Mr. Armstrong of the accident in a timely fashion. Both, however, deny claimant's allegations of timely notice. Additionally, the medical reports created contemporaneous with claimant's June 18, 2001, medical treatment focus on claimant's gallbladder, his cervical spine, his thoracic spine, his right shoulder and his right arm. There is no mention of any low back injury or any work-related connection to that low back injury contemporaneous with claimant's alleged date of accident. None of respondent's supervisors, including Mr. Fernkopf, Mr. Armstrong and Mr. Gasperich, were aware of claimant's alleged accident of June 18, 2001. The Appeals Board finds claimant has failed to prove that he provided timely notice of accident for the June 18, 2001, accidental injury.

The Administrative Law Judge found that respondent's failure to post the required notice pursuant to K.A.R. 51-12-2(a) resulted in the ten-day notice being expanded to 75 days as claimant, under K.S.A. 44-520, proved that the failure to timely notify respondent of his accident under this section was due to just cause. However, respondent's representative, John Fernkopf, testified that the workers' compensation notice form provided from his insurance agent was on the wall next to the front door. Additionally, claimant admitted to having suffered prior accidental injuries and receiving both medical treatment and temporary total disability compensation after notifying respondent of those accidents. Mr. Fernkopf also testified that all employees were advised at the periodic safety meetings that Mr. Armstrong was the person to notify in case of an accident.

Respondent has proven that claimant was advised, both at safety meetings and by way of the posted form, of the requirement that he provide notice of accident. The Appeals Board finds there was no just cause for claimant's failure to provide timely notice of the June 18, 2001, accidental injury. Therefore, for the above reasons, the Order of the Administrative Law Judge granting claimant benefits for the accidental injury of June 18, 2001, should be reversed.

With regard to claimant's alleged injury of July 30, 2001, respondent acknowledges its representatives were contacted on or about July 31, 2001, by Stormont-Vail Regional Health Center, inquiring about the possibility of the matter being submitted as a workers' compensation injury. Respondent acknowledges notice under K.S.A. 44-520 was timely for this accident.

Respondent, however, contends claimant failed to prove that he suffered accidental injury arising out of and in the course of his employment on that date. The Appeals Board finds respondent's contentions unsupported by the record. Claimant returned to work on July 30, 2001, and performed an activity which required that he bend, stoop and lift on a regular basis for an 8-hour day. By the time claimant had reached home that night, he was unable to get out of the car. His wife called an ambulance, and claimant was transported to the Holton Community Hospital emergency room. While being treated at the emergency room, claimant advised the emergency room personnel that he was at work and, while at work, his back hurt. There is no evidence in the record to contradict claimant's allegations of a work-related accidental injury on July 30, 2001. Uncontradicted evidence, which is not improbable or unreasonable, may not be disregarded unless it is shown to be untrustworthy. *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976). The Appeals Board finds that claimant has proven that he suffered accidental injury or, at the very least, an aggravation of his preexisting condition on July 30, 2001.

The Appeals Board, therefore, finds that the Order of the Administrative Law Judge granting claimant benefits for the July 30, 2001, injury should be affirmed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Brad E. Avery dated October 19, 2001, should be, and is hereby, reversed with regard to Docket No. 268,567, for an alleged accidental injury on June 18, 2001, but is hereby affirmed with regard to Docket No. 268,568, for an accidental injury occurring on July 30, 2001.

IT IS SO ORDERED.

Dated this ____ day of January 2002.

BOARD MEMBER

c: George H. Pearson, III, Attorney for Claimant
Christopher J. McCurdy, Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director